

# In the Court of Appeals of the State of Alaska

Nicole Marie Sherwood,	)	
	)	Court of Appeals No. A-12601
Appellant,	)	
v.	)	<b>Order</b>
	)	Remand for Evidentiary Hearing
State of Alaska,	)	
	)	
Appellee.	)	Date of Order: 7/17/19
	)	

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Trial Court Case # 3PA-16-00269CR

Before: Allard, Chief Judge, Fabe, Senior Supreme Court Justice<sup>1</sup>, and Andrews, Senior Superior Court Judge<sup>2</sup>.

Nicole Marie Sherwood appeals her convictions for driving under the influence, refusal to submit to a chemical test, and driving with a suspended license. One of the issues raised on appeal is whether the trial court erred in refusing to grant the defense a continuance to review late-filed discovery by the State.

Pretrial discovery in a criminal case is governed by Alaska Criminal Rule 16. Under Criminal Rule 16(b)(1)(A)(ii), the prosecutor is required to disclose to the defense “[a]ny written or recorded statements . . . made by the accused.” In Sherwood’s case, the prosecutor failed to turn over the audio and video recordings of the traffic stop

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<sup>1</sup> Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

<sup>2</sup> Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

and the DUI processing until the eve of trial.<sup>3</sup> However, when the defense attorney requested a continuance so that he could review the over two hours of recordings he had just received, the trial court refused to grant the continuance and instead told the defense attorney that he could listen to the late-filed discovery during the breaks in the trial. The court also criticized the defense attorney for having announced he was ready for trial without having received the discovery. Notably, the trial court did not criticize the prosecutor for having similarly announced he was ready for trial without having provided this basic discovery.

The trial court's remedy for the late discovery was clearly inadequate. The trial court told the defense attorney that he could listen to the recordings during the twenty-five minutes before jury selection and during the lunch break, which would likely be ninety minutes. But the record shows that the recordings were over two hours long and could not reasonably be reviewed in such short time periods. The trial court's proposed remedy also meant that the defense attorney had to participate in voir dire and opening statements without having fully reviewed the evidence against his client. It also potentially would have meant that the defense attorney would have had to cross-examine the officer without the benefit of this review. (Ultimately, this does not appear to have occurred because the cross-examination did not occur until the next day.)

Due process requires that a defendant be given a reasonable time to consult with counsel and to prepare their defense.<sup>4</sup> As the Alaska Supreme Court stated in *Klockenbrink v. State*, "[i]t is unquestionable that the right to the assistance of counsel

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<sup>3</sup> The defense attorney did not actually receive the materials until the morning of trial.

<sup>4</sup> *Doe v. State*, 487 P.2d 47, 56-57 (Alaska 1971).

of necessity includes the concomitant right to have a reasonable time in which to prepare for trial.”<sup>5</sup>

As a general matter, whether to grant a continuance is a decision that rests in the sound discretion of the trial court.<sup>6</sup> But that discretion can be abused. This case was pending for eleven weeks without basic discovery being produced. The record also establishes that this lack of discovery was brought to the trial court’s attention at least once during the trial status hearings. But no action was taken by the court and no discussion of sanctions ever occurred.<sup>7</sup>

However, before an appellate court will reverse a conviction on the ground that a continuance was unfairly denied, “it must appear that the refusal of additional time in some manner embarrassed the accused in preparing [their] defense and prejudiced [their] rights.”<sup>8</sup> On appeal, Sherwood’s appellate attorney argues that “possible cross examination and argument points” may have been overlooked because of the defense attorney’s inability to review the late-filed discovery prior to the commencement of trial.

Because it is impossible for us to discern on the current record whether prejudice actually occurred in this case, we conclude that a remand to the district court on the question of prejudice is required.

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<sup>5</sup> *Klockenbrink v. State*, 472 P.2d 958, 965 (Alaska 1970).

<sup>6</sup> *Salazar v. State*, 559 P.2d 66, 71 (Alaska 1976).

<sup>7</sup> See *Bostic v. State*, 805 P.2d 344, 347-48 (Alaska 1991) (holding that a violation of Criminal Rule 16(b)(1)(i) is presumptively prejudicial to the nonoffending party and including exclusion of evidence as a possible remedy if continuance is insufficient); see also Alaska R. Crim. P. 16(e)(1) (“Willful violation by counsel of an applicable discovery rule . . . may subject counsel to appropriate sanctions by the court.”).

<sup>8</sup> *Salazar*, 559 P.2d at 75 (internal quotations omitted).

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Accordingly, IT IS ORDERED:

1. This case is remanded to the district court. On remand, the district court shall hold an evidentiary hearing within ninety days of the date of this order, although that deadline may be extended for good cause.

2. At the evidentiary hearing, the parties shall litigate whether the refusal to grant the continuance actually resulted in prejudice to the defendant.

3. The district court shall submit its written findings on the question of prejudice to this Court. Upon receipt of the district court's written findings to this Court, both parties shall have twenty days to file any supplemental pleading addressing those findings. This Court will then resume its consideration of Sherwood's appeal.

Clerk of the Appellate Courts



Ryan Montgomery-Sythe, Chief Deputy Clerk

cc: Judge Wolfe  
Trial Court Clerk

Distribution:

Olena Kalytiak Davis - OPA Contract  
Attorney at Law  
120 W 11th Ave  
Anchorage AK 99501

Kerry A. Corliss  
Assistant District Attorney  
515 E. Dahlia, Suite 150  
Palmer AK 99645